

LEGAL ALERT – REED v. TOWN OF GILBERT

If you haven't familiarized yourself with [Reed v. Town of Gilbert, 576 U.S.](#) (2015), you should. According to the United States Supreme Court, if your town has sign regulations that make distinctions between different types of signs based on content, those regulations are most likely unconstitutional violations of the First Amendment. For example, if you allow directional signs to have a maximum sign area of six square feet, but allow other signs such as those displaying political or ideological messages to be larger in size (as did the Town of Gilbert), those regulations are undoubtedly unconstitutional.

The reason is that how and whether the regulations apply depends on the message the sign is conveying. As a result, they are considered "content based" regulations of speech. The Court presumes that content based regulations of speech are unconstitutional and subjects them to strict scrutiny. A municipality can overcome the presumption of unconstitutionality and survive strict scrutiny analysis only if it demonstrates that the regulations "further a compelling interest and are narrowly tailored to achieve that interest".

It is extremely difficult for any regulation to survive strict scrutiny. All nine justices (!) agreed that the directional sign regulations at issue in Reed constituted a violation of the First Amendment's free speech protections. In concurring opinions, three of the justices do express grave concern about the implications of the majority's analysis and reasoning. But it should be arresting to all planners in New Hampshire and throughout the country that all nine justices concluded that the Town of Gilbert's directional sign size limitation was clearly unconstitutional (According to Justice Kagan, the Town's defense of their sign ordinance did not pass the "laugh test").

The ramifications of this case are enormous and many questions remain. For example, does the Court's historical distinction between commercial and non-commercial speech survive Reed? And if so, can that distinction be used to justify at least some existing sign regulations that might otherwise be subject to strict scrutiny? What about off-premise signs regulations? Justice Alito in a concurring opinion states -- without explanation -- that these would not be subject to strict scrutiny. But it's not clear how since it's only by analyzing the message of the sign that a code enforcement official will be able to determine whether the sign is commercial, or whether it's off-premises.

Given the complexity of the case, the substantial impacts to your sign ordinance, and the possibility of expensive legislation, please consider registering for the "Signs, Signs, Everywhere are Signs: Sign Ordinances and the First Amendment" webinar scheduled for Wednesday, November 4, 2015, 12:00 PM – 1:00 PM. The webinar will be presented by NHMA Legal Services Counsel Stephen Buckley and Ben Frost, Esquire, of the New Hampshire Planners Association, who will offer their insights on this important new decision, and suggest strategies for amending sign ordinances in order to comply with this important Supreme Court judgment.

[Tim Corwin](#), AICP
Senior Planner
City of Lebanon

From [The Granite State Planner](#), Summer 2015 - newsletter of the [New Hampshire Planners Association](#)